The Past of Constitutional Theory—And Its Future

RICHARD DAVIES PARKER*

This is an appeal to my generation. Specifically, this is an appeal to people in the "generation of the 1960s" who are now doing constitutional law. We are, as a group, in a better position today than we have been before or probably shall be again to think about how we want to do constitutional law. On one hand, still relatively new to the teaching or practice of the law, we can think about it free, for now, of self-imposed orthodoxy. On the other hand, by now more or less established, we are in a position to think for ourselves, free of orthodoxy imposed by others—if only we will.

My appeal is this: Our elders have brought constitutional theory to a crossroads. Out of their experience of life in our polity, they have conceived the problems of its constitution in their own way. As a generation, we have had a rather different experience of life in our polity. Therefore, it is given to us to conceive the problems of its constitution in a new way.

The books by Jesse Choper and John Ely[1] provide an occasion for my appeal. Both authors work with a constitutional theory—a "process-oriented" theory—that has dominated the field for a long time. Both work inside that theory, revising it in similar ways and, I believe, perfecting it. In so doing, they take us to the crossroads at which we confront our present choice. We may continue along the line that they have followed. Or we may turn in a new direction. Their books indicate, in my view, that further elaboration of their lines of speculation can only lead us into a fog. The reason is not that they speculate too much about the quality of the political process and too little about substantive values.[2] Nor is it that their speculations are blindered by a focus on what the Court has already done.[3] Nor is it that, hampered by a conventional theory, they cannot say anything new.[4] Both of them innovate—indeed, Ely does so brilliantly. Rather, the reason is that, in doing it, they bring to the surface deeply rooted assumptions of conventional "process-oriented" theory that seem, or ought to seem, starkly implausible in light of the experience of our generation.

My essay is brief and yet it indulges in fairly sharp and general evaluations of types of theory, "conventional" and "new," and of generations of

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*Professor of Law, Harvard Law School; B.A., Swarthmore College, 1967; J.D., Harvard Law School, 1970.

1. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) [hereinafter cited as CHOPER]; J. ELY, DEMOCRACY AND DISTRUST (1980) [hereinafter cited as ELY].

2. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). I discuss this critique in the text accompanying notes 55–66 *infra*.

3. *See* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307, 1322–24 (1979). It is true, though, that what Choper and Ely advocate does not go much beyond what the Court has done. *See also* text accompanying note 42 *infra*.

4. *See* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980). I sketch what is novel in the two books in the text accompanying notes 32–45 *infra*.

theorists, "past" and "future." In that respect, it is an example of a sort of writing that now is starting to burgeon in our field.[5] This sort of writing is bound to irritate many readers. It blurs distinctions that are important to those whose views—to say nothing of those whose generations—are being typed. Beyond that, no one much likes to be pigeonholed as "conventional" or a vestige of "the past." Thus we hear complaints (intended to turn the tables) that such writing smacks of the rudeness, pretentiousness, and quest after novelty—the stubborn refusal to accept established wisdom—that (supposedly) is characteristic of our generation. To that charge I would make a plea of partial confession and avoidance. True, writing of this sort tends to slight nuances that absorb those who work inside a long-standing tradition of thought. It is a genre for outsiders. True, it tends to be confrontational. It is a polemical genre. True, it tends to call for some "new" perspective that, for the time being, it can only sketch from a "new" generation not yet committed to any such perspective. It is a hortatory genre. But these, I believe, are virtues. This sort of writing about the study of law has appeared before. It was common, for example, in the formative days of legal realism.[6] Then, as now, its aim was to distance—and so to liberate—us from conventions of thought about the law. Its appearance, now as then, marks a moment of opportunity, an opportunity for an intellectual advance that has first to be fired, shocked into life, by a renewed critical consciousness of assumptions that are taken for granted inside an established wisdom.[7]

I. THE PAST OF CONSTITUTIONAL THEORY: A VIEW FROM INSIDE

To appreciate the deep implausibility of the constitutional theory within which Choper and Ely work, we ought first to look at it from inside. That is, we ought to start with a sense of its aims, contours, and internal tensions. Therefore, I shall begin by sketching conventional theory. Then, I shall note some significant respects in which each of the two authors elaborate, extend, and revise the theory. And then, I shall sketch the sort of critiques to which each of them is vulnerable from inside the theory.

A. *Background*

The outlines of contemporary "process-oriented" theory may be simply drawn by locating it in relation to two polar pictures of our constitutional order that have appeared from time to time, in more or less diluted form, since

5. Most of the "burgeoning" so far has been in articles by one person, however. *See* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307 (1979). For an earlier example of this genre, *see* Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

6. *E.g.*, Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

7. *Cf.* Kuhn, *Reflections on My Critics*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 259–66 (I. Lakatos & A. Musgrave eds. 1970).

1787.[8] The constitution of our polity—the essence of its "good order"—may be depicted, first of all, as inhering in the constitutional document or in a system of abstract doctrine of constitutional law. In that case, constitutional order is seen as transcending—disembodied from—the clash of wills and movement of passions that characterize day-to-day political life. It may then be enforced *on* political life to discipline those wills and passions. Its enforcement is necessarily a process totally divorced from politics—detached, objective, a matter of abstract legal "reason."

At the other extreme, our constitutional order may be depicted as inhering not in a document or doctrine, but in our day-to-day politics. In that case, it is seen not as transcending the political process, but as embodied in it. The political process, in turn, is seen not as threatening, but as operating spontaneously in "good order." We can count on our political system, once set up, to work well enough. Hence constitutional order need not be enforced on politics. It need hardly be enforced at all.

Through the nineteenth century, diluted but recognizable versions of the two pictures of constitutional order appeared in Supreme Court opinions. Two general strategies seemed to emerge to reconcile them. First, there was an analytic strategy. This involved the analysis of constitutional issues into types. Some issues were seen in the context of one picture of constitutional order, and other issues were seen in the context of the opposite picture of constitutional order. This strategy appeared in two forms. In one form, the argument was made that some issues are "political questions," for the most part problems of expediency, and are best suited to resolution through the political process, while other issues involve principles calling for disembodied enforcement.[9] In another form, the argument was made that the representative political process generally can be counted on to protect interests implicated by doctrinal issues of one type—for instance, issues of national power—but that interests implicated by other doctrinal issues—for example, issues of individual rights—are much more likely to be threatened by that process and thus must find protection through the enforcement of disembodied order.[10]

Second, there was a synthetic strategy. This also took two forms. One form of the synthetic strategy started with the reliance on the document and doctrine fundamental to disembodied order and then qualified it by recognizing that their meaning is fluid. Thus, the argument was made that the import of

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8. The clash in the 1780s between two political ideologies related to my two "pictures" of constitutional order is described in G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 46–124, 162–96, 259–305, 344–89, 430–67, 593–615 (1969). In an as yet unpublished essay—entitled "Political Vision in Constitutional Argument"—I develop the notion of "pictures of constitutional order" and of "embodied" and "disembodied" constitutional order. I use the terminology here simply for purposes of (eventual) consistency; I do not elaborate on it here.

9. *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803).

10. *Compare, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401–02, 431, 435–36 (1819), *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 166, 170 (1803). In the 1870s, the Court seemed to believe that "states' rights" were more threatened by the political process than certain "individual" rights. *Compare, e.g.*, Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77–78, 82 (1873), *with* Munn v. Illinois, 94 U.S. 113, 134 (1877).

particular restraints on power may safely adapt—as the political process adapts—to changing times.[11] The other form of the synthetic strategy began with the reliance on spontaneous operation of the political process essential to embodied order and then qualified that process by taking note of its dangers. Thus, the argument was made that in general the political process works well enough, safeguarding all interests, but that it is subject to occasional malfunction, and hence that the mission of constitutional law is to enforce standards geared to correct such malfunctioning.[12]

By the turn of the century, both strategies appeared to be heading toward exhaustion. A majority of the Court tended to view all sorts of issues in a context of strictly disembodied order.[13] In response, dissenting Justices and commentators tended to view all sorts of issues in a context of embodied order.[14] Thus, they depicted the political process as basically "rational" and insisted that limitations be imposed on it only in assumedly extremely rare cases of clearly "irrational" mistake.[15] What is more, they not only debunked the idea that the political process is threatening, they also debunked the idea that a document or a doctrine has a fixed, determinate meaning and can be enforced with detachment or objectivity free of room for judicial discretion.[16] An enforcement decision, they concluded, is a political decision; and political decisions are properly and safely enough consigned to the political process. So, constitutional theory, for a time, seemed polarized, at an impasse. Contemporary "process-oriented" theory emerged in or around the 1930s[17] to resolve that impasse, to reinvigorate and elaborate old strategies of reconciliation.

The theory was developed for the most part by academics who had the time and motivation to reach new levels of sophistication in working out the old strategies of reconciliation. In the main, their enterprise was a reaction to the terms of the impasse that plagued constitutional theory in the early decades of the century. First, they sympathized with the belief that the processes of our representative democracy are basically in "good order," that they generally can be counted on to operate spontaneously to serve all interests. But, second, they sympathized with the belief that on frequent occasions those processes may threaten certain interests worthy of protection. In par-

11. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406–07, 415–16 (1819).

12. *E.g.*, *id.* at 423 (discussion of "pretext").

13. *E.g.*, Lochner v. New York, 198 U.S. 45 (1905). The "*Lochner* era," as is now recognized, was hardly uniform, although, I suspect, there is a risk that in emphasizing the inevitable variety of majority opinions in the "era" we may lose sight of their *general* character. As should be clear by now, however, I am making absolutely no pretense here of writing an intellectual history of the constitutional thought of two centuries. My purpose is simply to *sketch* a general background for "process-oriented" theory. I trust that my assertions about that background are not especially controversial. But their truth must depend on a detailed study that I have no intention of undertaking here.

14. *E.g.*, *id.* at 74–76 (Holmes, J., dissenting).

15. *E.g.*, *id.* The seminal academic statement of this view at the time was Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

16. *E.g.*, *id.*; Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

17. As everyone knows, the seminal statement was United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938). *See* Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942). *See also* Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 579–82 (1948).

ticular, they perceived the constant danger that "majorities" might oppress "minorities" and ride over fundamental "rights of individuals." They also were worried that, in the fast-changing times, the people's protections and the people's representatives might fail to respond to changing needs and wants. Yet, third, they accepted the view that the enforcement of constitutional limitations cannot possibly be perfectly objective, free of discretion, or detached from politics. That led them to become almost obsessed with the "anomaly" of judicial review—an institution necessary to correct the malfunctions of, yet "deviant" in, our representative democracy.[18] Animated by these concerns, they moved constitutional theory forward on three fronts at once.

First, they employed synthetic and analytic strategies to cope with the "anomaly" of judicial review. Recognizing that judicial enforcement of constitutional order inevitably involves a degree of discretionary political decisionmaking, they claimed that judicial discretion is nevertheless tempered by a degree of objectivity and detachment from politics. To substantiate this synthetic claim, they made much—though somewhat vaguely—of the learning and habits of reflection (supposedly) typical among judges, their tenured insulation from the pressures and passions of day-to-day political life, and thus their special capacity for reasoned elaboration of fundamental constitutional principles.[19] Furthermore, they argued that judicial discretion may be limited (though not eliminated) by boundaries established in the text or elsewhere on the fluid content of constitutional principles and by the constraining methodologies of proper judicial reasoning.[20] At the same time, they made the more analytic claim that certain types of issues (having to do, for example, with "civil rights") lend themselves especially well to judicial resolution according to principle, while other types of issues (having to do, perhaps, with "economic" matters or national power) are too bound up with questions of fact and policy, too "discretionary," and so should be left alone by the courts.[21] By the same token, they analyzed constitutional principles into various types, the application of some involving less substantial and so less "anomalous" judicial intervention than others.[22] Finally, they claimed that judicial review is also less "anomalous" in a representative democracy if judges act only on "process" issues having to do with perfection of representative democracy itself, avoiding interference in the political resolution of more controversial "substantive" matters.[23]

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18. *E.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962).

19. *E.g.*, Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960). *But see* Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960) (stating the truth of the matter).

20. *E.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (methodology); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) (textual boundaries).

21. *See, e.g.*, the review and discussion of this argument in McClosky, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

22. *E.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 200–34 (1962).

23. *E.g.*, Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court—A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

On both of the other fronts, the academic elaborators of contemporary theory coped directly with the problem of how to reconcile the two polar pictures of constitutional order, though their solutions always referred back to cope with the problem of judicial review as well. On one front, they resuscitated the old forms of the analytic strategy. First, Herbert Wechsler revived and elaborated the old argument that some types of issues—his focus was on questions of national power vis-à-vis the states—can safely be left for resolution in the political process while others cannot.[24] He argued that, in Congress, states' interests are well represented and thus spontaneously safeguarded. Second, Alexander Bickel adopted the other form of the analytic strategy. He, too, divided issues into types, but not doctrinal types. He claimed that on issues of "expedience" the political process can function well enough, while on issues of "principle" it may not.[25]

On the other front of contemporary theory, the theorists elaborated old forms of the synthetic strategy of reconciliation. First, they focused on the interpretation of the document and on the content of doctrine and argued that the meanings of both may adapt—as the political process adapts—to changing concerns. Thus, they depicted important provisions of the document as "open textured,"[26] left "to gather meaning from experience,"[27] setting out broad "concepts" within which each generation may articulate its own "conception" of constitutional guarantees.[28] Similarly, they depicted elements of doctrine like "balancing tests" as a synthesizing limitation of the political process with adjustment to its terms.[29] Second, the theorists also focused on the workings of the political process, depicting them as basically sound, but assigning to constitutional law a mission of correcting specific malfunctions in the process. On one hand, they concentrated on the process by which an "evolving consensus" in society controls government decisionmaking; they contended that the law should be shaped to clear occasional blockages in the way of that process and to undo its occasional distortion by vindicating "consensual" values flouted by government.[30] On the other hand, they focused on the process by which representation of competing interests in the political "marketplace" safeguards the interests of all; and they argued that the law should be shaped, once again, to remove blockages frustrating the process and to remedy its distortion by striking down governmental actions that seem to have resulted from some sort of "market failure."[31]

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24. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

25. A. BICKEL, THE LEAST DANGEROUS BRANCH 65–72, 111–98 (1962).

26. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 31–43 (1975).

27. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

28. Dworkin, *The Jurisprudence of Mr. Nixon*, N.Y. REV. OF BOOKS, May 4, 1972, at 27.

29. *E.g.*, Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962.)

30. *E.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 143–272 (1962).

31. *E.g.*, L. LUSKY, BY WHAT RIGHT? (1975).

These elaborations of the synthetic strategy consumed the most intense energies devoted to contemporary theory. Yet they also produced the most persistent quarrels among theorists. The quarrels were spawned both by the customary dependence of the strategy on vague, intuitive (and so controversial) assessments of the political and judicial process and by the lack of a systematic structuring of the strategy that was needed to sift and coordinate its various forms and claims. Theorists kept returning to worry over their peculiar obsession: judicial review. If both document and doctrine are fluid enough in meaning to adapt to fast-changing times, what real limitation is there on judicial discretion? If the Court vindicates values embraced by an "evolving consensus," isn't it taking upon itself a quintessentially political role? And if the Court steps in to protect losers in the political process, won't it become no more than another actor in the marketplace of interest-group politics? The wearying persistence of these all-too-familiar controversies suggested that the strategy of reconciliation might be about to break down once more.

This, roughly, was the situation of contemporary "process-oriented" constitutional theory when the new books by Choper and Ely were published.

B. *Perfection*

The publication of these two books is important because, I think, they perfect "process-oriented" theory. By that I do not mean that they leave nothing more to be said within such theory. Nor do I mean that they are (even close to) flawless. Rather, I mean that the two books, taken together, develop the theory to a level—whip it into a shape—that, at last, allows us to see what it truly involves, what sorts of things it has to say to us.

First, each of the books sets out to correct a shortcoming that before had frustrated development and clouded understanding of "process-oriented" theory. On one hand, Choper aims to build a more precise and empirical basis for the typical claims of the theory. Previously, the theory's dependence on vague conclusory intuitions about the functioning of the political process tended to germinate fruitless internal quarrels and to smother critical assessment under a blanket of pieties. So, Choper sets about to assemble and explore a mass of historical examples and political science research to ground his accounts of the political process. Ely, on the other hand, aims to provide the systematic structure, sifting and coordinating claims, that until now has been missing. Without such a structure, internal quarrels tended to go on in a rather haphazard fashion with most lines of argument dead-ending in the old conundrum of judicial review. Thus, Ely specifies and systematically elaborates a normative theory of a representative political process that (he proposes) will sufficiently constrain judicial discretion and, simultaneously, identify the occasional malfunctioning of our own political process which it is the main office of constitutional law to remedy. Ely does not ground his descriptions of our present political process in data. Nor does Choper elabo-

rate a comprehensive theoretical structure. Between them, though, they bring "process-orientation" to methodological maturity.

The second respect in which the two authors perfect the theory involves their elaboration of familiar "process-oriented" claims. Choper employs an analytic strategy. He contends that in general our political process operates effectively to ensure the responsiveness of government to the electorate.[32] Then, he examines the functioning and malfunctioning of the process with regard to three types of doctrinal issues. On matters of "individual rights," he claims, the process is likely to malfunction. For in America a "'high degree of mutual empathy does not exist.'" Hence, majorities are apt to "disregard" the interests of minorities, and judicial review is necessary to enforce "principles" safeguarding their rights.[33] Next, he claims that on issues of national power vis-à-vis the states and separation of powers between the executive and legislative branches, the process works very well. The interests implicated by such issues, he asserts, are represented by powerful actors in the process who have both the incentive and the capacity effectively to safeguard them. He concludes that judicial review consequently is unnecessary there, saving the judiciary from immersion in the discretionary assessments of "policy" that (he claims) are essential to those issues.[34] Large portions of his argument have been made before.[35] But the detail with which he elaborates it and his extension of it to encompass separation of powers issues appears to milk the analytic strategy for about all it is worth.

Ely employs a synthetic strategy. First, he considers interpretation of the constitutional document. He demonstrates that certain "open-ended" provisions not only allow, but invite fluid adjustment to changing circumstances. He argues, however, that their interpretation ought to be structured by a normative theory of a representative political process. Then, he goes on to evaluate our political process in light of his theory. Like Choper, he claims that the process normally functions to ensure government responsiveness to the electorate. But he focuses on two of its tendencies to malfunction. He contends, on one hand, that those in power have an incentive, in service of their self-interest, to impair access (through "voice and vote") of others to the process and, hence, to impair government responsiveness.[36] And, on the other hand, he argues that even if no one is barred from access, majorities—motivated by prejudice—are likely to disregard or undervalue the interests of certain minorities.[37] That, in turn, violates the duty of "equal concern and respect" for all interests that Ely claims is the core of representative government. He advocates judicial review to correct both sorts of malfunction.

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32. CHOPER, *supra* note 1, at 29–45.

33. *Id.* at 65.

34. *Id.* at 171–379.

35. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

36. ELY, *supra* note 1, at 104–34.

37. *Id.* at 135–79.

Although many elements of Ely's elaboration of the synthetic strategy are quite familiar, many—particularly his emphasis on motivation—are not.[38] With its rich texture and myriad doctrinal implications, his elaboration develops the strategy to a pinnacle of sophistication and coherence.

Finally, despite differences in methodology and strategy, Choper and Ely conspire to perfect "process-oriented" theory in a third respect. It has to do with the basic conception of the functioning and malfunctioning of the political process that is the foundation of the theory. Both of the authors conceive the process in the terms of interest competition and representation. They see it as a "market" in which particular interests compete, building shifting majority coalitions from issue to issue. And they evaluate its functioning and malfunctioning by determining whether the process is adequately responsive to those interests. In so doing, they reject a conception embraced by certain other "process-oriented" theorists—most prominently, Alexander Bickel—that concentrates not on the responsiveness of government to competing interests, but on its responsiveness to an evolving popular consensus. By opting decisively for an interest-focused conception, and rejecting a consensus-focused conception, Choper and Ely accomplish important improvements in the theory.

First of all, they cleanse the theory of the obscurantism introduced by the consensus-focused conception. As Ely contends, there rarely is such a thing as a popular consensus and, even if there were, its contours could not be identified with confidence.[39] By comparison, an assessment of the responsiveness of government to particular interests is relatively realistic and determinate.

Second, their interest-focused conception is more conducive to a rigorously "process-oriented" enforcement of constitutional principles than a consensus-focused conception.[40] To reverse a decision on the ground that it flouts values on which there is a consensus—a remedy which Bickel endorses in certain instances[41]—is, as Ely argues, to impose "substantive" values on the political process, and is therefore inconsistent with the aspirations of strict "process-orientation."[42] But to reverse a decision on the ground that it restricts the access of some interests to the process or that, motivated by prejudice, it did not take certain interests into fair account is, Ely insists, only

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38. There has, of course, been a great deal of discussion of the problem of "motivation" in the last several years. But Ely really started it all a decade ago. *Compare* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970), *with* A. BICKEL, THE LEAST DANGEROUS BRANCH 208–21 (1962). And Ely, unlike other recent writers, puts his discussion of motivation in the context of a general theory.

39. ELY, *supra* note 1, at 63–69.

40. A problem which recurs in "process-oriented" theory involves the proper remedies for a malfunction in the political process; once it is concluded that the process malfunctioned in producing some decision, it is clearly proper to remedy the cause of the malfunction, but is it appropriate to strike down the decision as well? For discussions of the problem, *see* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

41. A. BICKEL, THE LEAST DANGEROUS BRANCH 235–43 (1962). *But see* A. BICKEL, THE MORALITY OF CONSENT (1975).

42. ELY, *supra* note 1, at 63–69.

to perfect the working of the process, not to impose "substantive" values on it.[43] Even if Ely is not right about that, even if his approach cannot really live up to rigorous "process-oriented" pretensions,[44] the interest-focused conception is at least less patently subversive of such pretensions than the consensus-focused conception.

Third, in Choper's and Ely's hands, the interest-focused conception generates an account of political malfunctioning and thus of active judicial review that is more systematic than any generated by the consensus-focused conception. Proceeding from the latter conception, neither Bickel nor any of his successors has elaborated a general explanation of when and why government fails to respond to a broad consensus. Rather, their account of political malfunctioning—and of the appropriate occasions for active judicial review—has been relatively ad hoc.[45] By contrast, Choper and Ely perceive political malfunctioning when access barriers or prejudice against minorities undercut the responsiveness of government decisionmaking to relevant interests. The malfunctioning they identify is systemic, not ad hoc. Thus, they can account for—not simply carp about—the phenomenon of active judicial review. Not only do they sharpen the theory, they also make it (in the old, much maligned sense) "relevant."

C. *Internal Critique*

The perfection of "process-oriented" theory does not spell an end to disputes over questions of conventional constitutional theory. But, probably, it does portend an end to "constructive" controversy about them. It seems to me likely that conventional theorists will now devote their main energies to the destruction of the strategies of reconciliation only just perfected through "process-orientation." For the constitutional theory of the past contains, I believe, a dynamic that makes the strategies of reconciliation alluring and yet at the same time impossible to sustain, however perfect.[46]

What makes them alluring is the tension between the polar pictures of constitutional order that appears to have structured and animated our constitutional theory for a long time. Tension begs for some sort of reconciliation. What makes reconciliation impossible to sustain is that the ingredients required for it to work—through either an analytic or a synthetic strategy—are incompatible. The first vital ingredient is a theory of politics, at once prescriptive and descriptive, that specifies respects in which our political process functions well and respects in which it does not. Such a theory seeks to mediate between the fear of a dangerous politics central to the picture of disembodied order and the faith in a safely benign politics central to the

43. *Id.* at 75 n.*.

44. *See* text accompanying notes 51–54 *infra*.

45. *E.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 147 (1962).

46. I am, of course, turning against Ely his own rhetoric about the "allure" and "impossibility" of "interpretivism." *See* ELY, *supra* note 1, at 1–41.

picture of embodied order. The second ingredient vital for any workable reconciliation is that this theory of politics must itself be uncontroversial as a political matter. For if it is controversial, if it is implicated in the politics that it purports to describe and evaluate, it will not mediate successfully between the polar pictures of constitutional order. From one pole, it will be condemned as a threatening imposition of a partisan viewpoint; from the other, it will be criticized for short-circuiting the benign processes of politics. And from both poles, it will be rejected as a wholly inappropriate basis for decisionmaking by non-elected officials exercising the power of judicial review. Yet the fact is that any prescriptive-descriptive theory of this sort *will* be politically controversial. To be sure, its controversial nature may be covered up for a while. But, eventually, critics working from the premises of conventional theory will expose it.

No doubt, Choper and Ely did not conceive their enterprise in quite this way. Nevertheless, they appear to have understood the problem. For not only do they contrive in terms of interest competition a "process-oriented" theory of political life, they also struggle to establish it on an objective basis as "correct," uncontroversial. It is exactly that aspect of their books which, I believe, will inspire the most devastating internal criticisms. By sketching the *sort* of internal critique to which both authors are vulnerable, I want to suggest the probable futility, even on its own terms, of pursuing conventional theory much further.

Choper seeks to establish his theory of the functioning and malfunctioning of our political process on an objective basis of empirical fact. Repeatedly, he insists that he is engaging in a "pragmatic assessment" or a "realistic analysis" of our politics, not just airy, value-laden theorizing.[47] He marshals historical examples and political science research at nearly every point in his argument. No one can accuse him of skimping. Many pages of his book amount to long string citations of barely digested data. He makes no claim to completeness. Yet the standard by which he selected his tedious gobs of data is not revealed. The result is hardly compelling. Such criticisms should raise doubts about his effort to ground his theory on an uncontroversial foundation. More significantly, though, the "pragmatic," "realistic" lessons that Choper himself is able to draw from his data are remarkably hedged and vague. Again and again, assessing his data, he notes factors cutting various ways and inadequacies in ready evidence, admits that the questions are ones of degree to which "no wholly confident answer can be made," then concludes nonetheless that "there is support in reason and experience to believe" one thing or the other.[48] One must applaud his intellectual honesty. But one must also recognize that his noble methodological experiment in empiricism has not, finally, enabled him to escape dependence on the sort of controversial evalu-

47. *E.g.*, CHOPER, *supra* note 1, at 64, 214, 215.
48. *Id.* at 234.

ations that has always plagued "process-oriented" theory. And, even if a marshalling of data *could* be made to yield more clear-cut assessments of differences in qualities of interest representation in the political process, it still could not claim to establish the theory on an objective, uncontroversial basis. This, in the end, is the decisive point: the very idea that the political process "functions" (that is to say, functions in "good order") whenever every relevant interest (how do we know which are "relevant"?) is adequately represented (what ought that to mean?) in governmental decisionmaking—and that it "malfunctions" otherwise—is itself a potentially very controversial proposition. No quantity of data will make it any less so.

Ely recognizes this point. He tries to solve the problem. Repeatedly, he condemns alternative approaches to constitutional law by claiming that they rest on seriously controversial values and that their contours are significantly indeterminate.[49] Thus he sets for himself a mission of transcending these shortcomings. He surpasses Choper by seeking an uncontroversial foundation not for factual assumptions involved in his theory, but for its very root proposition: that our political process functions well when all relevant interests are adequately represented in governmental decisionmaking. He attempts to establish the proposition on the basis of an objectively "correct" constitutional interpretation.[50] Hence, he claims that the Framers must have intended "open-ended" clauses of the document to grow in meaning, but insists that the growth be bounded by some determinate principle. That principle, he claims, is provided by "a coherent political theory" mandated by the Framers. It defines, he insists, "*the* American system of representative government."[51] And, once elaborated, it mandates fairly determinate answers to constitutional issues—with room only for a few "judgment calls."[52] Ely's approach is very clean and neat. But it can be blown apart from inside with remarkable ease. Indeed, internal criticism beginning to blow it apart has already begun to appear. First, the application of Ely's theory of representative government can be shown to depend on obviously controversial value judgments—not just close "judgment calls."[53] Second, his definition and

49. ELY, *supra* note 1, at 43–72.

50. Granted, Ely says that it is only on his "more expansive days" that he is "tempted to claim" that his approach "represents the ultimate interpretivism." *Id.* at 87–88. He must then have drafted the crucial pages dealing with his theory of representative government only on those days, because his tone in presenting the theory is consistently one of announcing a plain truth. *Id.* at 77–88.

51. *Id.* at 77 (emphasis added). Choper also uses the notion that there is *one established normative political theory* as a premise for his argument at certain points. *See* CHOPER, *supra* note 1, at 64, 79. It is an easy—but, I would have thought, an utterly incredible—way of trying to camouflage, or insulate from criticism, the values on which an argument is based. It would take an absurdly simplistic (or biased) view of social life and intellectual history to believe that any *one* set of values has *ever* really been so completely established as to be *the American* set of values. Surely, social life and intellectual history are somewhat more complex and confused than that. And, certainly, this is the case when the set of values in question is a "coherent political theory" built of concepts that are "essentially contested." *See* Gallie, *Essentially Contested Concepts* in M. BLACK, THE IMPORTANCE OF LANGUAGE 121–46 (1962).

52. ELY, *supra* note 1, at 103.

53. *See* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307 (1979). *See also* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

elaboration of the theory involves a concealed imposition of controversial values as well. It cannot be written off as the mandate of the Framers. Ely lambastes the idea that there is such a thing as a consensus on values today, but he blandly asserts that there was a consensus on "a coherent political theory" among the Framers. He relies, for example, on a book by Gordon Wood to support his assertion. But he seems to have ignored the central theme of the book: that at the time the original Constitution was framed there was an absolutely radical disagreement on political theory.[54] Perhaps there is more of a consensus today; perhaps more people today believe in the "coherent political theory" Ely advocates; perhaps his book is an exercise in contemporary consensus theory after all. But, if that is the case, Ely himself has already blown it apart in his condemnation of contemporary consensus theory. Ely's theory, then, appears to me to be Ely's theory—no more and no less. As such, it is very interesting. But by Ely's own standard that is not enough.

Failing to establish a theory of the political process on a firmly objective basis, "process-oriented" theorists can still fall back, of course, to a more qualified claim. They can claim that although prescriptive-descriptive theories of the political process are themselves bound to be politically controversial and thus to involve the controversial imposition of "process values," they are not *as* controversial as theories of "substantive value" and their enforcement is therefore *less* problematic. This claim is an old chestnut within conventional theory. Because Choper and Ely thought it insufficient, they sought to do better—and did not succeed. Whether or not it will suffice to defend the strategies of reconciliation in future debates within conventional theory remains to be seen. My guess is that it will not. My guess is that—with "process-oriented" theorists having perfected their position and having tried and failed to ground it on a firmer foundation—the strategies of reconciliation will break down and conventional theory will polarize once again.

These internal quarrels can—and undoubtedly will—go on at great length. It is always fair and generally valuable to evaluate a theory by its own aims, to try to pop its pretensions. It is also the path of caution. But, after a while, we ought to ask: what is the point? Once we suspect that maybe conventional constitutional theory is inherently self-defeating, shouldn't we begin to look at it not from the inside, but from the outside?

II. THE PAST OF CONSTITUTIONAL THEORY: A VIEW FROM OUTSIDE

When we first studied constitutional law—sometime around a decade ago—the conventional theory that I have described was pretty much all we were given in the way of constitutional theory. And, even at that, it was still at a relatively nebulous stage of development. Without any apparent alternative to it, without any very clear sense of its defining contours, we were trapped

54. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 393-615 (1969).

inside it. Controversies about subsidiary issues like the justification of judicial review, judicial "activism" versus "deference," "neutral principles," "balancing," and so forth took up our energy. So, perhaps we can be excused for having failed to distance ourselves and consider critically the more basic problems of constitutional theory. Now, there is no excuse. Choper and Ely—particularly Ely—have elucidated and perfected conventional theory, putting the subsidiary issues into a larger framework. Alternatives to it are starting to be sketched. Now, if we do not try to look at conventional theory from the outside, we will have only ourselves to blame for our entrapment in it.

There seem to be two main sorts of external critique which are beginning to be applied to conventional theory. They suggest different directions for the constitutional theory of the future. The first, I believe, is fine as far as it goes. But it does not go far enough. I shall argue, instead, that the second offers us the best opportunity at last to free ourselves from the dead hand of conventional theory and strike out on our own.

A. *"Process" and "Substance"*

The first sort of external critique distances itself from the debates going on within conventional theory by occupying high ground from which it looks down and discerns in them a distorting, deluded superficiality. From its vantage point, the problem with conventional theory is the all-consuming focus on "process values"—and, in particular, on the quality of the political process—rather than on more fundamental "substantive values." The burden of this critique is that constitutional theory should be a theory, as Laurence Tribe puts it, of "fundamental substantive rights."[55]

The critique begins by exploiting and extending an internal critique of "process-orientation." "Process values" cannot be regarded as primary and, at the same time, be set off from "substantive values" since, Tribe insists, the former, if primary, are entwined with the latter.[56] This is so in two respects. The reason process is "constitutionally valued," Tribe argues, is for "its intrinsic characteristics"—for example, "as an expression of the equal respect in which we as a society aspire to hold each individual" or of "a right to individual dignity, or some similarly substantive norm."[57] If it is valued only "as a means to some independent end," it can hardly be viewed by theorists as primary. Process itself, therefore, becomes substantive.[58] What is more, the two kinds of values are entwined, Tribe shows, in application as well.[59] To decide whether the political process malfunctioned in burdening some group, for instance, we cannot help making some substantive estimate of the group's interest and of the interests served by burdening it. Thus, Tribe notes, "[a]ny

55. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067 (1980). My discussion of Tribe's views in this section refers only to the views he presents in this one article.

56. *Id.* at 1067–77.

57. *Id.* at 1070, 1072.

58. *Id.* at 1070–72.

59. *Id.* at 1068–70, 1072–77.

constitutional distinction between laws burdening homosexuals and laws burdening exhibitionists . . . must depend on a substantive theory of which [group is] exercising fundamental rights and which [is] not."[60]

Having argued that if "process values" are to be viewed as primary, they must be acknowledged as "substantive," the critique goes on to contend that "substantive values," in fact, deserve to be viewed as being of primary importance in constitutional theory. The focus of "process-orientation," in other words, is not simply confused. Worse, it is upside down. Constitutionally, substance is more fundamental than process. Tribe suggests that this is so on three grounds. First, the latter may depend on fundamental assumptions about the former, while the former may not depend on assumptions about the latter. Second, a narrow concentration on the process by which a decision was reached may produce toleration of decisions whose effects are what really most matter and strike us as substantively obnoxious. And, third, there are certain conceptions of value fundamental to specific constitutional provisions—like "freedom" in the first amendment, "equality" in the fourteenth—that ought to be fully (including substantively) explored instead of being shaped automatically and superficially to fit the mold of "process values."

In some respects, this critique is attractive. And some of the directions it points out for future theory ought to be heeded. Surely, "process-oriented" conceptions of the proper operation of the political process rest on assumptions about substantive value—for example, Ely's norm of "equal concern and respect" depends on assumptions about the character of equality—yet such assumptions rarely are studied. Without doubt, the importance of value assumptions to process conceptions—as well as to an assessment of the effects of decisionmaking processes and the potential meanings of certain provisions of the Constitution—calls for their exploration in the constitutional theory of the future.

Nevertheless, the critique does not go far enough. It is not, I believe, critical enough of conventional theory. Nor does it provide us adequate direction for the future. First, it relies on and, simultaneously, undermines a distinction between "process values" and "substantive values" that sometimes seems just a play on words. It is true, to be sure, that "process-oriented" theory makes much of the distinction. So, it is worthwhile to undermine it, showing that process issues *are* substantive issues. But then to turn around and contend not only that "substantive values" are entwined in process issues and deserve full exploration, but also that they are more fundamental and should be the primary focus of constitutional theory is to indulge in unnecessarily metaphysical typologies. It is to become obsessed with the same overabstract distinction that fascinates "process-orientation." I would think that the crux of conventional theory is *which* values are embedded in its assumptions, not that those values are viewed as having to do with "process" instead

60. *Id.* at 1076.

of "substance." And, by the same token, what we need to know is *which* values to explore in future theory.

This is not to say that the critique utterly ignores the question of *which* values ought to be treated as basic in constitutional theory. To the contrary, the champions of "substantive theory" do take a position on this question. Thus Tribe calls for—and criticizes "process-oriented" theory for lacking—"a developed theory of fundamental rights." What, then, are such "fundamental rights"? They are rights, says Tribe, "secured to persons against the state." And he insists that other norms cannot be "understood, much less applied, in the absence of" some attention to those values.[61] For Tribe—and he appears typical of the champions of this approach in this respect[62]—the values that ought to be treated as basic in constitutional theory have to do with the security of persons vis-à-vis government.

There lies the second shortcoming of the approach. Bent on combatting the "process-oriented" focus on values that have to do with the systemic quality of political life, it goes too far. It tends to slight the importance of such values—and exaggerate the significance of personal security values. Instead of arguing that both be viewed as basic, it tends to eclipse the former with the latter. This blunts its critique of conventional theory. It can fault that theory for downplaying values of personal security. But it disables itself from getting at what, I would think, is the crux of conventional theory: *which* values involving the systemic quality of political life are taken seriously within that theory. Furthermore, it also points future theory in a wrong direction. How can it be that the constitution of our polity is not basic to constitutional theory? Perhaps the quality of political life cannot be evaluated without considering what "fundamental rights" persons ought to have against the state. But how can we consider questions of "fundamental rights" without evaluating the quality of the political life which is the context of all rights and which shapes the state?

This approach, finally, suffers from a third shortcoming. It recognizes, as Tribe says, that constitutional theory "demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives."[63] It thereby sweeps aside the anxiety that cripples conventional theory from within. If ever there is to be progress beyond conventional theory, we have to applaud this move: good riddance. But the champions of this approach generally fail to support the move. Tribe assumes that any controversial issues addressed by theory must

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61. *Id.* at 1067. Tribe does refer to some other values having to do with the general quality of political life—"political community" and "democracy"—as significant. *Id.* at 1071, 1078–79. But he does not integrate these references into his line of argument that personal security values, *rather than* the quality of the political process, are what should count as *basic* to constitutional theory.

62. *See, e.g.*, D. RICHARDS, THE MORAL CRITICISM OF LAW (1977). I am not suggesting that Tribe and the others who share this basic view also share other views about constitutional theory.

63. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067 (1980).

then be given to courts for resolution, invoking "the care and humility that we are entitled to expect of judges" to support allocation of controversial choices to them. This sort of argument—familiar in old-time conventional theory—is an easy target for the likes of Ely.[64] Other champions of the approach try harder, claiming that controversial substantive choices can be tamed by tying them to an "evolving consensus."[65] This argument, too, has roots in old-time conventional theory. And it, too, is an easy target for the likes of Ely.[66]

If, in future constitutional theory, we are to recognize and embrace the necessity for controversial choices of value, freeing ourselves from the self-defeating anxiety of past theory, we must free ourselves of old rationalizations that only compound the problem. We must confront directly the assumptions that lead "process-oriented" theorists to shy from controversial choices in constitutional theory, blandly consigning them to the workings of the political process—assumptions, that is, about the quality of the political process itself.

B. *The Systemic Quality of Our Political Life*

There is another critique—the one I want to promote—that distances itself from the internal debates of conventional theory not by taking ground high above them to bombard them with a typology of values, but rather by engaging them directly so as to cut the ground out from under them. It concentrates on *which* values are taken more or less for granted in such debates and so dominate conventional theory. And, in particular, it criticizes values involving the systemic quality of our political life that are the foundation of that theory. This approach, I believe, not only can yield a more powerful critique, freeing us from our entrapment in the theory of the past. It can also point out the direction for a promising constitutional theory of the future.

Like the first sort of external critique, this one begins by exploiting an internal critique of "process-orientation." It capitalizes on the recognition that the prescriptive-descriptive conception of the functioning and malfunctioning of the political process promoted by "process-oriented" theory cannot be shown to be objectively "correct." But it is not satisfied merely to show that the conception is open to controversy. Instead, it proceeds to investigate and characterize the particular values structuring that conception. In the end, it characterizes "process-oriented" theory as a sophisticated apology for the truncated, systemically biased political life of our liberal welfare state.

For now, I simply intend to sketch very roughly the *sort* of critique this involves. I have neither the time nor the space to elaborate it and support it fully here. That is part of the work that remains for the future. To illustrate at

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64. *See* ELY, *supra* note 1, at 44–48.

65. *E.g.*, Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

66. ELY, *supra* note 1, at 63–69.

least its contours, I shall first criticize the basic tenets of the "process-oriented" conception of the political process. Then, I shall criticize the crucial structural limitations of that conception. And, finally, I shall indicate the sense in which "process-oriented" theory, as perfected by Choper and Ely, is an exercise in apologetics.

1. *Tenets*

Look carefully, once again, at the two most basic, explicit tenets of the"process-oriented" conception of our political life as set forth by Choper and Ely. I shall try to outline them somewhat more completely and precisely than I have up to now:

(1) In operation, our process of representative democracy *normally functions well enough.*
   (a) Government decisionmakers, being responsible to the people at periodic elections, are *generally responsive* to the interests of majorities.
   (b) Majorities are not stable through time or across issues. They are *shifting coalitions* formed in a process of *basically fair and open competition among "minority" interests.*
   (c) Because majorities are shifting, government decisionmakers cannot afford completely to ignore minority interests on any particular issue for fear that those interests might be necessary to form a majority later. Thus, generally, they will *take all interests into fair account* with respect to particular decisions.
   (d) Individuals and groups generally can be counted on to *recognize and promote their own interests* through exercise of their voice and vote.

(2) This process, though, is subject to *occasional, systemic malfunctions.*
   (a) Acting in their own self-interest, those "in" power may try to *restrict* the *voice and vote* of some of those who are "out" of power, thereby distorting the process of fair interest competition.
   (b) In cases of *majority prejudice against certain minorities,* the process of formation of shifting majority coalitions may be distorted. So, government decisionmakers may disregard or undervalue the interests of such minorities.

Two things about these prescriptive-descriptive tenets stand out: our political process *works well enough as it is,* and it is given (only) to rather *discrete* sorts of malfunction. Now, look at how Choper and Ely justify their adherence to the tenets.

First, in assessing the normal functioning of the process, their standard for concluding that it works well enough turns out to be surprisingly low. For instance, Choper acknowledges that a great number of citizens do not vote,

take no significant part in our political life (i.e., by using their "voice") and are "almost totally uninformed" on "both major questions of public policy and minor matters of detail."[67] Yet, according to Choper, that might not "be as incompatible with majority rule as it is made to sound." He weakly opines that "a great many" issues "do not concern large numbers of voters and probably should not."[68] By the same token, both authors acknowledge that legislatures very often are not responsive to majority coalitions seeking passage of new legislation or a repeal of old legislation. Politically effective minorities, they concede, often undermine representative democracy. But they insist that so long as such minorities can only block legislation—and not pass their own legislation without majority support—that is good enough.[69] Finally, Choper insists that the majority (of those who vote) can sometimes affect policies on "fundamental" issues in an election "if they feel strongly enough about them."[70] Still, as a day-to-day matter—when the mass of citizens do not "feel strongly enough," or are not well informed or simply do not take any significant part in political activity—Choper concedes that our political process works through the "Burkean trusteeship" of our representatives, informed by the influence of regularly active minority interest groups.[71] The "trusteeship," he notes, is constrained mainly by a fear that the usually passive, uninformed bulk of citizens might, *in extremis*, be driven to "'outrage'" and, at long last, break form, wake up, and mobilize themselves for the next election.[72] Nonetheless, he maintains that this system does "comport with democracy, albeit somewhat murkily and imprecisely."[73] Despite "surface blemishes," he insists, there is an "unshrinking core of popular responsibility" in our political process.[74]

Contained in all of this, quite plainly, is a relatively simple assumption. The standard by which Choper and Ely determine the normal functioning of our political process to be good enough is not simply low. It is skewed against concern for potential majorities—the mass of people who are not now politically active and whose interests can be most routinely blocked by more effective interests. At bottom, both authors assume that our process of interest competition and representation works well enough even when the bulk of citizens take no very significant, regular part in it.

Turn, secondly, to their identification and discussion of instances in which the political process malfunctions. The sorts of instances they identify are, I have mentioned, fairly discrete. That follows from the tenet that in general the process functions adequately. But the instances of malfunctioning are not just discrete. They are also skewed. And, again, they are skewed

67. CHOPER, *supra* note 1, at 15.
68. *Id.* at 31.
69. *Id.* at 26–27; ELY, *supra* note 1, at 67.
70. CHOPER, *supra* note 1, at 30.
71. *Id.* at 31.
72. *Id.* at 33. *See* ELY, *supra* note 1, at 129.
73. CHOPER, *supra* note 1, at 45.
74. *Id.* at 48.

against concern for potential majorities, who take no significant part in the process of political interest competition. Just as the routine non-participation of such citizens is not treated as detracting from the adequate functioning of the political process, so too it is not treated as an indication that the process is malfunctioning.

Choper and Ely do not see any indication of malfunctioning there because of another, related but deeper assumption. As they see it, people who are not minority victims of prejudice and have the opportunity to use their voice and vote, and yet take no part in our political life, do not have anything important to complain about from the standpoint of constitutional order. Such citizens presumably choose their own passivity; they may be satisfied with governmental decisions on the whole, or they may simply prefer to do other things with their time.[75] Presumably, such citizens can also "trust" government decisionmakers to take their interests into account and serve them adequately since perception of their interests is not distorted by majority prejudice.[76] These articles of faith of "process-oriented" theory are blind to the likelihood that the "choice" of political passivity by inactive citizens and service of their interests by the government may be significantly undermined by inequalities of power, wealth, status, and education. The fact is that the theory depends, at bottom, on the assumption that such inequalities afflicting the mass of citizens—not members of a "discrete and insular" minority—need not be taken into consideration for purposes of evaluating the functioning and malfunctioning of our system of representative democracy.

To give some idea of the controversialism and bias of this assumption, I shall note a few concerns that "process-orientation" should consider but does not. In order to avoid the usual charge that only "radicals" could regard it as an implausible assumption, I shall rely on the recent books by two "mainstream" scholars and sometime collaborators: Robert Dahl and Charles Lindblom.[77]

First of all, the "choice" by citizens to remain politically quiescent appears substantially less than "free." Dahl describes it in terms of a "cycle of defeat" by which "low resources," "weak political incentives," and "inadequate skills" reinforce each other.[78] "[O]f all the factors that social scientists have used to account for differences in political participation, *differences in social and economic status are the most important,*" he reports.[79] While "skills and incentives are to some extent independent of resources," he notes that "they do tend to run together in the United States."[80] And he adds:

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75. *See id.* at 30–31.

76. This notion would follow from the belief of both authors that officials tend to "disregard" only the interests of minority victims of prejudice.

77. Dahl is one of the political scientists that Choper and Ely most like to cite. *See* CHOPER, *supra* note 1, at 488; ELY, *supra* note 1, at 264. And many of Dahl's ideas were developed with Lindblom in R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE (1953). In order not to take way more than my share of space, I shall try to stick with citing only Dahl and Lindblom.

78. R. DAHL, DEMOCRACY IN THE UNITED STATES 488 (3d ed. 1976).

79. *Id.* at 450.

80. *Id.* at 488.

> What is more, it must come as a shock to many Americans to learn that the effects on political participation of these differences in social and economic status appear to be greater in the United States than in other democracies. In one comparison, only in India were the differences in participation greater![81]

Yet such general barriers to political participation do not figure in the evaluation of our political life by Choper and Ely.

Second, the extent to which the inactive, less well-to-do citizens can count on government officials to give their interests "equal concern and respect" is open to substantial question. Dahl observes that "[t]hose who are better off participate more, and by participating more they exercise more influence on government officials."[82] And, as to those with lower resources, "[d]ecisions . . . are likely to be made, therefore, without taking their preferences into account."[83] Lindblom carries the point farther. He contends that business has a "privileged position" in our political process. Business interests, he asserts, are not simply capable of blocking a majority will; they are also assured of special treatment.[84] For Chopér and Ely, none of this need be taken very seriously.

Choper does consider the role of interest groups in politics. He observes that there "is a sizable literature" on the problem—and cites a book published in 1951.[85] He says that "our knowledge" on the matter is "far from complete"—and cites a book published in 1963.[86] Citing an article also published in 1963—and a book published in 1928—he dons his rose-colored glasses and claims:

> the several studies undertaken suggest that the various interest groups tend to fill existing gaps—or serve as effective links—between voters and representatives, especially between elections; that legislators tend to respond initially by seeking to determine whether the urgings of pressure groups reflect a generally held constituent view, are opposed by a majority of their electorates, or involve a matter that is of no special concern to most of the voters in their district; and that the lawmakers then exercise that degree of judgment with which they feel empowered—but almost always with the next election in mind.[87]

He concludes by quoting Alexander Bickel's view—vintage 1962—that "'*no one has claimed*'" pressure groups are able to "'capture'" government without "'combining in some fashion, and thus capturing or constituting . . . a majority.'"[88] Needless to say, such a claim *has* been made in the intervening eighteen years—for instance by Lindblom.[89] But Choper

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81. *Id.* at 451.
82. *Id.* at 449.
83. *Id.* at 493.
84. *Id.*
84. C. LINDBLOM, POLITICS AND MARKETS 170-200 (1977).
85. CHOPER, *supra* note 1, at 23.
86. *Id.*
87. *Id.* at 45.
88. *Id.* (emphasis added).
89. I shall stick with Dahl and Lindblom and resist offering a massive string citation of the literature Choper slights. But it may be worth noting that even introductory political science texts could be cited. *E.g.*, E. GREENBERG, THE AMERICAN POLITICAL SYSTEM (2d ed. 1980); M. PARENTI, DEMOCRACY FOR THE FEW

appears oblivious to the fact.[90] He does quote Dahl—from a book published in 1956—to the effect that the process of "minorities rule" works within a "consensus set by the important values of the politically active members of the society."[91] Yet he seems not to know (or perhaps care) about Dahl's more recent analysis of the effect of inequality on *which* members of society become "politically active."[92]

Third, if any one of the tenets of the "process-oriented" conception of our political process is the most fundamental, it is the tenet that citizens are able to recognize and articulate their own interests. They clearly will not have the capacity to promote their interests through political participation and thereby ensure that government officials take their interests into account unless they have that prior ability. Yet even this tenet is questionable if social and economic inequalities are considered. Dahl contends that "opportunities for discovering what one wants [and] for communicating to others what one wants" are impaired by inequalities in education.[93] And, once again, Lindblom goes farther. He explores a phenomenon of "circularity" in our political process. He argues that business interests "mold" the "volitions" of the mass of citizens at least on "grand issues" of social and economic structure.[94] Ely does comment briefly on this question of "false consciousness." He recognizes that "sufficiently pervasive prejudice" against some minorities may distort their perceptions of their self-interests.[95] And, earlier, in dismissing "consensus" as a basis for identifying constitutional values, he entertains the view that a "consensus" is "likely to reflect only the domination of some groups by others."[96] But, when it comes to evaluating the functioning and malfunctioning of our political process, neither he nor Choper bothers to examine the likelihood that political interest competition is systemically distorted by a similar domination rooted in general social and economic inequalities.

In at least these three respects, then, "process-oriented theory is oblivious to the effect that inequalities afflicting the bulk of quiescent citizens may have on the systemic quality of our political life—thus its bias against the interests of potential majorities. The malfunctions on which this theory

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(3d ed. 1980). So could contemporary political science "classics." *E.g.*, H. KARIEL, THE DECLINE OF AMERICAN PLURALISM (1961); T. LOWI, THE END OF LIBERALISM (1969); G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE (1960).

90. Perhaps I am being too hard on Choper here. After all, Ely is just about as oblivious to noncentrist and/or recent political science writing. But the fact is that Choper, more than Ely, purports to rest his argument on political science research.

91. CHOPER, *supra* note 1, at 45.

92. For Dahl's even more recent writing on political inequality, *see* Dahl, *On Removing Certain Impediments to Democracy in the United States*, 92 POL. SCI. Q. 1 (1977); Dahl, *Pluralism Revisited*, 10 COMP. POLITICS 191 (1978); Dahl, *What is Political Equality?*, DISSENT 363 (Summer 1979); Dahl, *A Reply to Richard Krouse*, DISSENT 456 (Fall 1980).

93. R. DAHL, DEMOCRACY IN THE UNITED STATES 491 (3d ed. 1976).

94. C. LINDBLOM, POLITICS AND MARKETS 201–13 (1977).

95. ELY, *supra* note 1, at 165.

96. *Id.* at 63.

focuses have to do, rather, with the concerns of "discrete and insular" minorities. Yet, even then, "process-oriented" theorists resist recognition of social and economic inequalities. Their resistance invites a last insight into the assumptions underlying the tenets of the theory.

Choper and Ely identify "discrete and insular" minorities—and thus political malfunctioning—strictly by searching for the existence of prejudice. They both believe that prejudice distorts the "empathy" that decision-makers otherwise may feel for citizens.[97] But, if it is clear that prejudice is crucial in "process-oriented" theory, it has never been clear exactly what is supposed to be the root of prejudice, the malady that the theory, at bottom, is meant to address. Consequently, it has never been clear exactly what is supposed to be the cure for prejudice. Ely investigates the issue. He recognizes that merely affording a minority group access to the political process cannot, by itself, cure prejudice; so, he argues, the process may malfunction even if it is open to all minorities.[98] But, he says, there is a cure. The cure is "social intercourse."[99] And, he implies, the malady is a lack of such "social intercourse." If all minorities enjoyed both access to the political process and "social intercourse" with the rest of us, there would be no reason to be concerned any longer about any malfunctioning of the process. For, says Ely, "[t]he more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation."[100]

Now, there is something peculiar about this. I would think that "social intercourse" is unlikely to cure prejudice so long as the parties concerned are substantially unequal in power or status. It is said, after all, that slave owners enjoyed close and regular association with their slaves. If Ely complains that that was not the *right kind* of "social intercourse," we are entitled to ask him: why not? Not long ago, it was said that if only whites and blacks were integrated, racial prejudice would disappear. Now, that view seems naïve. If Ely objects that, so far, integration has not produced the *right kind* of "social intercourse," we ought to ask: how so? If inequalities of power and status have something to do with it, why obfuscate them with vague talk of "social intercourse"?

It is possible, at this point, that Ely will concede that inequalities have a lot to do with it.[101] But the concession would discredit the theory. It would grant that prejudice is not really the most fundamental barrier to full participation in our politics by minority groups. It would grant that most minority groups are, roughly, in a position similar to that of the mass of nonminority

97. *Id.* at 160–61; CHOPER, *supra* note 1, at 65.

98. ELY, *supra* note 1, at 151.

99. *Id.* at 161.

100. *Id.* The banal, sentimental character of this statement of Ely's central assumption contrasts curiously with the sharp, witty verbal pyrotechnics that run through less central portions of his argument.

101. *See id.* at 135. *See also* text accompanying notes 109–10 *infra*.

citizens afflicted by inequalities—and hence that the theory is, at bottom, almost as oblivious to the plight of one as the other.

In other words, such a concession would entitle us to ask: If inequalities have a good deal to do with the malfunctioning of the political process vis-à-vis most "discrete and insular" minorities, is it not probable that inequalities afflicting other citizens also spoil the quality of our political life—and of our constitutional order? At that point, if I know "process-oriented" theory, Ely is unlikely to make any more concessions.

2. *Structure*

What should we make of this sort of blindness and bias in "process-oriented" theory? As a first step toward an answer, we ought to look at certain limitations built into the structure of the theory. There are, I believe, several important structural limitations. Plainly, they are related. Plainly, some are more fundamental than others. But, taken together, they may begin to help us interpret—though not explain—the theory's stubborn resistance to a broader, deeper, more critical evaluation of the political process.

The first and probably the most obvious structural factor that limits the vision of "process-oriented" theory involves its special obsession: "the problem" of judicial review. Since both Choper and Ely are likely to defend the role of this limitation, I shall discuss it at some length. In the end, however, I shall argue that it is a good deal less significant than the others.

"Process-oriented" theory focuses first and foremost on the quality of the political process. It aims at stating requisites of constitutional order for that process. And so it works out a conception of the functioning and malfunctioning of our politics. Yet it also aims to do something else. It assumes that the only requisites worthy of much discussion are ones that can and ought to be *enforced*.[102] Therefore, it focuses on the judicial process as well. It seeks to justify, and state norms for, the exercise of judicial review. To do so, it must work from a conception of the functioning and malfunctioning of the judicial process. The theory aspires, finally, to mesh this conception of the judicial process with its conception of the political process.

The basic principle it adopts to mesh the conceptions is that the judicial process malfunctions if it intervenes when the political process is functioning well enough, but that, at least prima facie, it functions properly so long as it intervenes only when the political process is malfunctioning.[103] So stated, this "meshing" principle manifestly subordinates the conception of the judicial process to the conception of the political process. The latter marks the boundaries of the former. In practice, however, the former sometimes seems to mark the boundaries of the latter.

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102. The assumption may be rooted in the influence of the picture of disembodied constitutional order. *See* text accompanying note 8 *supra*.

103. *See* text accompanying notes 18–31 *supra*.

What characteristically happens is this. The conception of the judicial process, first of all, seems to evolve a life of its own. Assuming, as a general matter, that judicial review is a "counter-majoritarian" anomaly in our democracy, theorists see it as fundamentally problematic. They fear that, in general, it creates serious risks of judges imposing their values on us all.[104] And these concerns are not entirely put to rest by the principle limiting judicial intervention to instances of malfunctioning in the political process. Instead, the general, worried conception of the judicial process is embedded deep in the structure of the theory and is taken for granted when theorists turn to determine what should *count* as a malfunctioning of our political process.

Thus, when "process-oriented" theorists focus on the political process, they do so through the darkened, constricted lens of their worries about the judicial process. Whatever political malfunctioning they identify calls, by their assumption, for the exercise of judicial review. The identification of any instance of malfunctioning, then, becomes fundamentally problematic. The effect is to build into the structure of the theory a limitation on its capacity to point out and criticize malfunctioning in our political process—a bias toward proclaiming the process to be basically fair and sound.

There is evidence of this structural limitation at work in the books by Choper and Ely. Its influence shows most plainly early in both books when the authors insist that, even though our political process is "imperfectly" democratic, it generally works democratically enough from the standpoint of constitutional order. To conclude otherwise, they note, would invite wholesale judicial review. And no matter how undemocratic the political process may be, it is more democratic, they contend, than judicial review.[105]

Yet, surely, this goes too far. By this standard, judicial review of any actions by any elected officials (or appointees who are responsible to them) would seem inappropriate. This standard, then, would seem to indicate that in order to avoid the need for judicial review, we should treat the political process as working well enough not *generally*, but *always*. Neither Choper nor Ely is willing to adopt such a position. By their lights, the political process, though based on elections, does seriously malfunction—and judicial review, however undemocratic even by comparison with a malfunctioning political process, is justified—sometimes.

The question is: when? One factor that occasionally seems to structure their response to this question is the general worry about judicial review. First, it influences them to minimize the instances of malfunctioning they identify. Thus, Choper backs his view that the political process should be treated as working well enough on matters of national power vis-à-vis the states—hence, that the Court should stay out of the area—by arguing, in part, that the Court needs to ration its precious "capital" and "reduce the discord

104. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962).
105. CHOPER, *supra* note 1, at 48; ELY, *supra* note 1, at 67.

between judicial review and majoritarian democracy."[106] Second, the worry about judicial review also produces norms (like the norm of "principled" decisionmaking) intended to restrain the judiciary. The authors are moved, in turn, to identify only such instances of political malfunctioning as can be corrected without violating the norms. Thus, Ely backs his view that most instances of "false consciousness" should not be treated as involving a malfunctioning of the political process by arguing, in part, that an evaluation of "false consciousness" depends on mere disagreements with substantive choices, something courts must avoid.[107]

It might be tempting for defenders of "process-oriented" theory to claim that their worry about the undemocratic character of judicial review is the most important—indeed, even the only important—structural factor that limits their criticism of the political process. They might say: "Personally, we would like to correct a lot more 'imperfections' in our democracy. As a matter of constitutional theory, however, we cannot take on all of those things. The reason has nothing to do with any of our assumptions about the quality of our political life. Instead, it has only to do with the *fact* that judicial review is utterly undemocratic and, hence, that it must be used sparingly and in a restrained fashion." This claim will not wash.

It will not wash for two reasons. First, as perfected by Choper and Ely, the theory does not ground its benign assessment of the quality of the political process only—or even primarily—on arguments involving the limitations of judicial review. An important advance made by both authors is, after all, to come out from hiding behind the subsidiary question of judicial review and rely on a direct conception (in terms of interest competition and interest representation) of the functioning and malfunctioning of our political process. Surely, concern about judicial review has a limiting influence. But limitations that are intrinsic to that conception must be at work as well. It could hardly be otherwise. For, second, the concern about judicial review is itself bound up with basic assumptions about the quality of the political process. Once "process-oriented" theorists determine that certain sorts of political malfunctioning are sufficiently serious to call for the exercise of judicial review, despite its "undemocratic" character, then the concern that remains becomes relative. It varies—and the efforts to minimize and restrain judicial review vary—with assumptions about the quality of the political process. The more fundamentally sound the theorists assume the process to be—the more exceptional they assume serious malfunctioning to be—then the more anomalous judicial review will appear to them. The more anomalous it appears, the more they will seek to minimize and restrain it. And the more they seek to do that, the greater will be their inclination to identify only limited instances of political malfunctioning, thus depicting the political process as basically sound. But now we have come full circle. An assumption of basic soundness

106. CHOPER, *supra* note 1, at 2.
107. ELY, *supra* note 1, at 166–67.

yields a relatively sharp concern about judicial review that then yields a depiction of basic soundness. Consequently, it is in the "process-oriented" conception of our politics—and not so much in concerns about judicial review—that we ought to look for the most crucial structural limitations on the vision of "process-oriented" theory.

There are five related factors that structure and limit this conception of the quality of our political life. They have to do with the sorts of values to be guaranteed, and the power to be regulated, by constitutional order. Their effect, as a whole, is not just to limit the capacity of "process-oriented" theory to identify malfunctioning in the political process. More precisely, it is to blind the theory to a particular type of malfunctioning: the routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens.

The first limitation of the "process-oriented" conception of political life is, of course, its primary focus on the process by which outcomes are generated, not on the outcomes themselves. In particular, "process-oriented" theory maintains that, from the point of view of constitutionality, *distributive* outcomes are not of primary importance. Thus Ely opines that constitutional order does not depend on "some 'appropriate' distributional pattern."[108]

This structural limitation—diverting attention from the distribution of resources that comes out of the political process—may have an effect of diverting attention from inequalities in the distribution of resources that influence what comes *into* the process as well. But the effect is only tentative. Ely, in fact, suggests that inattention to distributive outcomes does not imply inattention to unequal inputs. He notes parenthetically that the "distributional pattern" resulting from the political process may even be worth studying as "powerful evidence of what that process is likely to have been."[109] And, in one brief passage, he goes so far as to note that recently "more stress has been placed on the undeniable concentrations of power, and inequalities among the various competing groups, in American politics."[110] In that passage, he almost seems to promise that his theory will grapple with the impacts of general inequalities and concentrations of power on the political process. He does not, however, deliver on the promise. To begin to interpret his failure, we have to look at the other structural elements of his theory.

The second limitation built into the "process-oriented" conception of our political life is its primary focus on only one dimension—the simplest and most restricted dimension—of the phenomenon of power: decisionmaking. The power which absorbs its attention is power evidenced in particular decisions—decisions, for example, to benefit or burden particular groups or activities. To put the point even more simply, the power that counts is power whose evidence is visible in concrete actions, concrete behavior.

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108. *Id.* at 135
109. *Id.* at 136.
110. *Id.* at 135.

The behaviorist character of this conception of politics limits its capacity to perceive a broader, deeper, more difficult dimension of power. Focusing on power evidenced in decisions, it tends not to see power as a relationship among groups—a relationship, that is, in which certain groups simply "have" more power than other groups by virtue of having more resources of one sort or another.[111] In the eyes of "process-oriented" theory, the condition of "being" weak is not significant in itself. Thus the theory ignores the probability that a condition of weakness might prevent a group from appreciating, articulating, and mobilizing to promote its interests. It thereby ignores the probability that a condition of weakness might impair a group's capacity even to get its interests on the "agenda" of the political process. In other words, the "process-oriented" conception of politics is oblivious to a dimension of power involving "nondecisions," that is, inaction.[112]

Even in assessing decisionmaking, a third structural factor restricts its vision. As perfected by Choper and Ely, the theory concentrates on only two dimensions of the decisionmaking process: whether "access" was open and whether decisions were motivated by "prejudice." The focus on access and prejudice diverts attention, once again, from the fact of unequal participation in the process. Access, of course, is important. But "process-orientation" fails to assess what actually was *done* with access. It is blind to the dimension of the process "located" in between access and decision: the competition among—and the capacity of—groups to exploit their access and influence the decision. By neglecting to attend to this dimension, "process-orientation" fails to take account of the *effectiveness* with which groups having unequal resources take part in the competition. Undoubtedly, its focus on motivation of decisions by prejudice can get at some distortions of the process of competition indirectly. But since it gets only at distortions afflicting minority victims of prejudice—and since, even as to them, it provides a check only against manifest oppression, not a guarantee of effective participation—it further obfuscates the competitive disadvantages of masses of ordinary citizens.

The fourth limitation built into the "process-oriented" conception of politics is probably the one most taken for granted. The decisionmaking process the theory addresses represents simply one dimension of decisionmaking processes—the one located in the government. Hence, the sort of power with which the theory deals represents only one dimension of power: official power. Although political theorists long have known that the (small "c") constitution of a polity resides not only in the distribution and use of official power, but also in the distribution and use of "private" power,[113] "process-oriented" theory concentrates on the former and, for the most part, ignores the latter.

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111. *See* S. LUKES, POWER (1974).

112. *See* P. BACHRACH & M. BARATZ, POWER AND POVERTY 39–51 (1970); S. LUKES, POWER 11–25, 36–45 (1974).

113. Dahl mentions Jefferson, Madison, Aristotle, and Rousseau. R. DAHL, DEMOCRACY IN THE UNITED STATES 491 (3d ed. 1976).

It is true, of course, that Choper and Ely assign great importance to prejudice against minorities, and prejudice has its origin in society, not in government. It is true, also, that Ely stresses the importance of "social intercourse" as the solvent of prejudice. But, in the end, prejudice is important to them only insofar as it seems to infect decisions by government. They do not even bother to mention what would appear one of the most critical doctrines of constitutional law: the state action doctrine. For "process-oriented" theory is, at bottom, blind to the distribution and exercise of social power outside government. It thereby blinds itself to conditions which frustrate "social intercourse," inequalities which disable masses of citizens from effective participation in the official political process, and myriad circumstances in which individuals, day by day, are subject to—and are trained to subject themselves to—the will of others.

The last structural limitation of the "process-oriented" conception of political life follows from the others and helps to put them into sharp relief. It involves the nature of the rights guaranteed by constitutional order. On this subject, Ely pursues the implications of "process-orientation" farther than any of his predecessors. He characterizes most constitutional guarantees as guarantees of a fair process. Then, he concentrates on two kinds of guarantees: rights of access to the political process ("voice" and "vote") and rights of minorities to fair treatment within the process.[114] As to the former, he acknowledges an irreducible core of "substantive constitutional entitlement."[115] But, outside that minimum core, he proposes one principle to inform and govern both kinds of guarantees: the principle that government must treat all interests with "equal concern and respect." This principle means that whether interests are to be protected will depend on whether the *reason* for a decision burdening them was *neutral* in regard to those interests.[116] Thus "process-orientation" homogenizes a huge portion of constitutional rights and grants us a general right to a neutral reason when government fails to serve our interests.

This homogenization of rights yields definitive answers to a range of issues. Just as an equal protection claim of a minority group will fail if the government has a reason for burdening that group independent of prejudice against it, so many free speech claims (for example, of a right to burn a draft card as a protest) will fail if the government has a reason for burdening the speech independent of its content.[117] The homogenized right to a neutral reason also justifies quick dismissal of most claims having to do with the incapacities of the poor. For as Ely notes:

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114. ELY, *supra* note 1, at 88–101, 105–25.

115. *Id.* at 145.

116. *Id.* at 141. The "equal concern and respect" principle was originally Ronald Dworkin's. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977). For present purposes, I am concerned only with the meaning Ely—not Dworkin—gives to the principle. It is of some interest, though, that Ely, who mocks reliance on the philosophy of John Rawls to identify constitutional values, himself partially relies on the philosophy of Ronald Dworkin (and Robert Nozick). *Compare* ELY, *supra* note 1, at 58 *with id.* at 82, 136.

117. ELY, *supra* note 1, at 136–45.

> [F]ailures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures—and at all events they will be susceptible to immediate translation into such constitutionally innocent terms.[118]

Yet, as should be plain, this homogenization of rights involves a thinning out of rights as well.

The effect of the "process-oriented" notion of rights is, first of all, to divert attention from the substantive weight of the burdens imposed by government. Second, it is to obscure the differential impact of neutrally rationalized governmental actions on different groups. Third, it is to slight the interest in *effective* enjoyment of rights—such as free speech rights—by groups lacking the resources to make much use of them.[119] And, fourth, it is to short-circuit claims to "affirmative" assistance needed for both the effective and the equal enjoyment of rights.

As Ely might say, a neutral reason from the government may be "a thing of beauty and a joy forever";[120] but for those who do not, and cannot, take an effective and equal part in using the power to which they are subject, in choosing when and why it will be used, a neutral reason would seem thin stuff indeed.

3. *Apologetics*

Now, we are in a position to figure out what to make of "process-oriented" constitutional theory. The blindness and bias of the theory cannot be dismissed—any more than Choper can dismiss "imperfections" of our political process—as mere "surface blemishes." For they are embedded into its structure. Nor can they be written off as limitations dictated by the constitutional document. For, as Ely shows, its open-ended provisions invite interpretation in light of some prescriptive-descriptive conception of our polity; and, as his critics can easily show, no particular conception is plainly the "correct" one. Nor, finally, can the limitations of the theory be explained away simply as corollaries of constraints on "the judicial role." For our conception of the judicial role is, instead, the corollary of our conception of our polity. One conclusion, then, cannot be avoided: the theory is the manifesto

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118. *Id.* at 162.

119. At one point, Ely does take some account of the effective enjoyment of rights, saying that the fact that sound trucks "are more frequently resorted to by those whose access to more expensive and less annoying media is limited . . . is something that belongs in the calculation." *Id.* at 111. This little concession is not elaborated; if Ely were really to take the effective enjoyment of rights seriously, he would, I believe, find the structure of his theory collapsing in "distributional" inquiries. *See* text accompanying note 101 *supra*. In suggesting that Ely's theory can accommodate serious attention to *any* distributional issues, Tushnet is mistaken. *See* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1054–55 (1980). My contention is that blindness and bias are structurally *basic* to the theory.

120. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973).

of one political faith. Whether we accept it turns, in the end, on whether we are adherents of that political faith.

What political faith? As perfected by Choper and Ely, the theory embodies the ideology of what, for some time, has amounted to the center in American politics. And so it enjoys the typical protective coloring of most centrist beliefs. It hardly seems to embody a political faith at all. Instead, urging the integration of minorities into the political process, it appears to represent nothing more and nothing less than "sound judgment and good sense." When closely examined, however, it turns out, also, to be an exercise in apologetics. Proceeding from the conventional assumption that our polity may sometimes malfunction, but is otherwise basically sound, it obscures our biased, withered politics in a fog of apologetic rhetoric. It consecrates the domination of our polity by the politically effective few and the reduction of the rest to more or less passive consumers of the ministrations of government. The theory represents, at bottom, the fundamental political faith of the administrators of our enlightened, liberal welfare state.[121]

The language of "process-oriented" theory is primarily a language of democracy—which is to say, a language of political equality, political freedom, and popular sovereignty. This is the language Choper and Ely use to urge marginal, although undeniably important, reforms of our political process. Yet this too is the language with which they praise the process. In their hands, the rhetoric of democracy serves to shield the political process from being held very rigorously to account to the ideals of democracy.

Consider, first, the "process-oriented" definition of the central problem of constitutional law: majority rule. And notice that, as "process-oriented" theorists see it, the central problem is not *whether* a majority of citizens (actually) rules, but *that* a majority of citizens (supposedly) rules. Thus, the primary worry of such theorists—the concern around which their theory pivots—is that "majorities" may disregard or undervalue the interests of "minorities." If they even acknowledge the opposite concern—that powerful minorities can get the state to act in ways that disregard or undervalue interests of nonmobilized majorities and that, in any event, legislative majorities often fail to champion the interests of passive popular majorities—they tend abruptly to dismiss it. They do not dignify it with serious consideration. Choper offers brief, bland assurances that majorities do, in fact, "rule."[122] Ely puts down the opposite view with a flippant crack.[123] To them, majority rule is not a democratic ideal against which to measure our polity. Rather, it is something to be taken as given. It is the stuff of a rhetoric, suffusing their

121. *See* M. WALZER, *Dissatisfaction in the Welfare State*, in RADICAL PRINCIPLES 23–53 (1980). Choper and Ely, however, do not go to the extremes of contemporary "neo-conservatism." *See, e.g.*, Huntington, *The Democratic Distemper*, THE PUBLIC INTEREST 9 (Fall 1975). Ely, of course, denies that he is promoting *any* ideology. But he does so by assuming a narrow, muddled definition of ideology, asserting that a conception of a "process of government" is independent of any "governing ideology." ELY, *supra* note 1, at 101.

122. CHOPER, *supra* note 1, at 44–45.

123. ELY, *supra* note 1, at 130 n. *.

theory, with which they consecrate our polity as already fundamentally majoritarian.

Consider, next, the language they employ to depict the process by which majorities (supposedly) are formed. Choper and Ely agree that, with its political "channels" kept "unclogged" or "cleared," with the right to "voice and vote" fully guaranteed, the process is a "democratic" one.[124] They both invoke the language of political equality to portray that process. Choper equates protection of "voice and vote" with "affording *all* participants in the democratic process a full and fair opportunity to influence the promulgation and alteration of policies affecting them."[125] And Ely describes such protection as insurance that the process is "open to those of *all* viewpoints on something approaching an *equal* basis."[126] As I have already shown, however, both of them are blind to the real world of political inequality. They may well be aware that, in the view of many political scientists, it confuses the concept of "democracy" to apply it to a polity in which the resources crucial for effective participation are so unequally distributed.[127] But neither of them deems it necessary to so much as mention that view. For them, the reality of political inequality and the conditions for effective participation are not of much importance—because, for them, the talk about political equality and "democracy" serves an essentially rhetorical purpose, not to critique the political process but to depict it as in need only of marginal reform.

Consider, finally, the main sort of reform they urge and the way they advocate it. Here, I must focus on Ely since Choper only adumbrates his view.[128] Ely's most important contribution is not his discussion of rights to "voice and vote"—the rights of citizens as active participants in government. Instead, his main contribution—and, it would seem, his predominant interest[129]—involves rights of citizens as consumers of government. He notes that minority victims of prejudice often may be unable to "protect" their own interests, much less affirmatively promote them, through active participation in the political process. Hence, he proposes a conception of representative government by which officials would be obliged at least to "take into account" the interests of those who are unable to "protect themselves."[130] His proposal envisions an ideally rational welfare state, responsive to the groups

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124. Of course, they insist on more than just "open channels"; but the mere "openness" of the channels counts for them as "democracy."

125. CHOPER, *supra* note 1, at 71 (emphasis added).

126. ELY, *supra* note 1, at 74 (emphasis added).

127. For purposes of analytic clarity, Dahl has long referred to our polity as a "polyarchy," not a "democracy." He writes: "Certainly the gap between democracy and polyarchy in the United States cannot be narrowed very much without reducing the amount of inequality among Americans in their access to political resources." R. DAHL, DEMOCRACY IN THE UNITED STATES 489 (3d ed. 1976). *See* R. DAHL, POLYARCHY (1971). *See also* C. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (1977); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970).

128. CHOPER, *supra* note 1, at 70–79.

129. Ely's chapter on "Clearing the Channels of Political Change" is considerably less intricate and integrated than his chapter on "Facilitating the Representation of Minorities."

130. ELY, *supra* note 1, at 82–84.

which effectively promote their interests in the political process, but guarding the others against oppression, assessing their interests with a clear-eyed view of "reality" not "distorted" by prejudice.[131] The proposal, as far as it goes, is admirable enough. But Ely is determined to clothe its protection of groups, whose situation as politically ineffective consumers of government he takes as given, in the rhetoric of an ideal democracy. Thus, again, he employs the language of democracy not to insist on the realization of democracy, but as an apology for acceptance of something much less.

First, he warps the democratic ideals of "participation" and "representation"—which usually connote a polity founded on an active, effective citizenry—to dress up his conception of a polity in which citizens doomed to political ineffectiveness rely on officials to take their interests "into account." He portrays official attention to the concerns of the "functionally powerless" in the notorious old language—"anathema to our forefathers"—of "virtual representation."[132] Like the colonial authorities, he twists the ideal of "representation" to imply that it is possible to be represented in government without being able effectively to participate in government. Then, he twists the ideal of "participation" as well, suggesting that if officials "take into account" the interests of the powerless in allocating burdens and benefits, the powerless may then be said to "participate" in "the bounty of government."[133] To tout "participation" in governmental "bounty," divorced from effective participation in government itself, is to use a word that implies action to sanctify mere consumption.

Second, Ely invokes the rhetoric of political equality to insist that when officials take account of the interests of those unable to "protect themselves," they must show "equal concern and respect" for such interests. This language has a democratic ring. But, as Ely applies it, it denotes the most minimal "equality" of protection. It simply means that when government responds to the requests of politically effective groups to serve their interests, it must have a rationale that does not denigrate the interests of the politically ineffective groups.[134] It is not clear what, if anything, "equal" then adds to the requirement of "concern and respect." But it is certain that the requirement does not afford, as Ely suggests,[135] *equality of representation.* It allows officials affirmatively to *promote* the interests of more powerful citizens while, at best, it obliges them to *protect* the interests of "functionally powerless" citizens. Incantation of egalitarian language may obscure this fact but will not change it.

Third, Ely manipulates the republican political theory of the eighteenth and nineteenth centuries to provide his conception of representative govern-

131. *Id.* at 153.

132. *Id.* at 82–84. His emphasis on "trust"—like Choper's emphasis on representatives as "trustees"—also sugar-coats political passivity.

133. *Id.* at 74.

134. *See* text accompanying notes 114–20 *supra.*

135. ELY, *supra* note 1, at 82.

ment—responsive to powerful groups but taking account of the interests of politically ineffective groups—an imprimatur of history. He defines the central principle of the theory as government "in the interest of the whole people."[136] He notes that the theory was based on a notion of "the people" as "an essentially homogenous group," and he even acknowledges that republicans insisted that their polity be based on a more or less equal redistribution of wealth.[137] But, then, zipping through the nineteenth century, he states that "faith in the republican tenet that the people . . . were essentially homogeneous was all but dead." In light of this perceived heterogeneity, he says, "the theory of representation had to be extended" to ensure that representatives would respond not only to the "majority" but also take account of the interests of "minorities."[138] Thus, from the central principle of republicanism, he derives his own conception. This historical account (for all its superficiality; it takes only a few pages in his book) is compelling rhetorically. But it obfuscates at least two important things. First, Ely swiftly sweeps under the carpet the republican belief that the polity should rest on a relatively equal distribution of wealth. He equates it with faith in social homogeneity—hardly a necessary equation—and then hastens to observe—as though it dealt with the problem—that that faith was "dead" by the nineteenth century. He moves the shells pretty fast. But, examined closely, the derivation of his conception of representative government from republican theory is too obviously flawed to have much value as anything more than rhetoric. Second, the derivation is also flawed in its premise. In stating what he treats as the central principle of republicanism—government in the interest of the whole people—Ely flatly ignores an equally vital republican principle: that the polity rests upon the virtue of, and the vigilant attention to public affairs by, the people.[139] In republican theory, citizenship is taken seriously. It is seen as necessarily active. In fact, *maintenance* of government in the interest of the people is said to *depend* on active involvement of the people in political life.[140] Ely, however, not only suppresses the republican concern for social equality, he suppresses as well this republican tenet of an active citizenry. He thereby enables himself to use republicanism to cloak his radically different conception of representative government, which takes inequality and the passivity of the bulk of citizens for granted.

The political faith embodied in "process-oriented" theory, as perfected by Choper and Ely, is in many respects laudable. In calling for the integration of minority groups into a polity that is assumed to be otherwise basically sound, it is resonant of the most advanced liberal thought of the late 1950s, the period

136. *Id.* at 79.
137. *Id.* (misspelling of "homogeneous" in original).
138. *Id.* at 82.
139. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 52–70 (1969).
140. *See id.* at 52–56. The best of the now voluminous writing on republicanism is J. POCOCK, THE MACHIAVELLIAN MOMENT (1975).

when Choper and Ely grew up.[141] Much of its program was achieved—in part by the Warren Court—during the 1960s.[142] Now, it is mostly a matter of defending those achievements. And in the next decade they will need defending. To the extent that the books by Choper and Ely build needed defenses, they deserve our applause.

Nevertheless, they do not deserve our emulation. In his criticism of another constitutional theory, Ely complains that it is marred by a "systematic bias . . . in favor of the values of the upper-middle, professional class from which most lawyers and judges . . . are drawn."[143] So is his "process-oriented" theory. It seeks the integration of minorities into a polity that is biased against citizens who lack the resources needed to be politically effective, a polity therefore in which masses of citizens sink into political passivity as clients dependent on the minimal protection provided by the welfare state, a polity which consequently is dominated by the "upper-middle professional class." "Process-oriented" theory is not just uncritical of that polity. It constitutes an apology for it.

III. THE FUTURE OF CONSTITUTIONAL THEORY: WITHOUT MAPS

"People understandably think that what is important to them is important, and people like us are no exception," proclaims Ely.[144] Nor are people like us. Like our elders, who elaborated and have now perfected "process-oriented" constitutional theory, we are in the "upper-middle professional class." That—along with myriad other things, including caution—may incline us simply to pursue the line of inquiry laid out by our predecessors, adding filigree to their conceptions of the functioning and malfunctioning of the political process, perhaps extending their proposals for marginal reform, but embracing, as they have embraced, and apologizing, as they have apologized, for the status quo, further obfuscating its deep injustice. But that need not be our fate. We grew up in an era when it was virtually impossible to feel comfortable with the status quo, an era when it was not so easy to dismiss a "radical" critique with a clubbish word of derision, an era when hope for a newer world came naturally. It is open to us, as it was not open to our predecessors, to imagine a political life far different—far more democratic—than the one we know now. It is given to us to re-explore the constitutional theory of our polity.

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141. I do not mean to make any sort of claim of generational-*determinism* either with respect to their generation or mine. But it would seem obvious that the time when one grows up is influential on one's thought and attitudes. *See* the general discussion of the "theory of generations" in R. WOHL, THE GENERATION OF 1914 (1979).

142. Ely suggests that the work of the Warren Court was consistent with his approach. ELY, *supra* note 1, at 75. In a later article, I intend to explore the extent to which the Warren Court also began to develop a concern with the "equal and effective enjoyment" of rights inconsistent with Ely's approach.

143. *Id.* at 59.

144. *Id.*

If we strike out in that direction, however, we shall have to do so without clear maps. Scholarship in other fields will be helpful. But, for the most part, past constitutional law scholarship will not. Once we recognize the blindness and bias that is built into its structure, we shall see that we are largely on our own. Only a few very general aspects of the job ahead of us seem plainly marked.

First, we need to deepen our critique of orthodox theory. This is important, on one hand, in order to ensure that we—and our students—do not, in the inevitable moments of uncertainty, slip back into the easy argot of the past. On the other hand, it is also important in order to derive lessons for the future. Any critique ought to involve an articulation of the assumptions that go unstated in conventional theory. It also ought to involve analysis of how such assumptions are concealed in the theory and how they work to promote its (apparently) persuasive force. Finally, it ought to involve an exposure of the nonnecessity and even the perniciousness of those assumptions.[145] No doubt, we will be told that we have no standing to criticize the orthodoxy until we have something well-developed to offer in its place. We should resist that admonition. For if we do not develop our critique, we shall never free ourselves of the terms of conventional theory to develop anything new.

Second, even to begin to remake constitutional theory, we need to liberate our enterprise from the deep constraints imposed by the implicit mission of conventional theory. That is, we must set aside the polar pictures of embodied and disembodied constitutional order and repudiate the goal of reconciling them. Once we free ourselves of the picture of embodied order, we shall need no longer to take it for granted that the constitution of our polity is fundamentally sound, subject only to occasional malfunctioning. Thus, we shall free constitutional theory of its basically conservative, apologetic orientation and allow it to take into account much more radical flaws in our political process. By casting off the picture of disembodied order, we shall unburden theory of its futile, constraining aspiration to political neutrality. And, so, we shall invest it with a capacity not only to take into account, but also to critique the radical flaws in our political life.

The final aspect of the job ahead of us in constructing a new constitutional theory is the most important but, for now, the most opaque. It involves elaboration of a new—a much more ambitious—conception of what our polity could and should be, a critique of our actual polity in the terms of that conception and then an analysis of its possible implications for the substantive values to be vindicated, and doctrines through which to vindicate them, in various areas of constitutional law.[146] We shall have to be willing to speculate

145. My approach in my "political vision" project is to focus on assumptions secreted in the rhetoric and imagery of conventional constitutional law argument.

146. My approach is to take seriously and work from (while, no doubt, revising) the classical conception of a republic, including its elements of relative equality, mobilization of the citizenry, and civic virtue.

freely about these matters without making the conventional assumption that anything we advocate necessarily must be capable of immediate enforcement by the courts. Judicial enforcement and its timing may depend, after all, on all sorts of prudential concerns;[147] and unless we segregate those concerns and insist on their clearly subsidiary status, we shall allow—just as our predecessors have allowed—our perception of the present condition of our polity and of what can immediately be accomplished within it to stunt our vision of what our polity might, one day, become and our criticism of what it now is.[148]

There is no predicting now what the constitutional theory of the future will be. But, at least, it is ours—for the time being—to make. And it is our mission, I am convinced, to make it something very different—an expression of the possibilities of democracy instead of an apology for its corruption—from the constitutional theory of the past.

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147. The best discussion of this aspect of the enforcement of constitutional law is still A. BICKEL, THE LEAST DANGEROUS BRANCH 111–272 (1962). Bickel's discussion, however, is spoiled by his inadequate conception of the political process, *see* text accompanying notes 39 and 45 *supra*, and by his deeply conservative assumptions about the limits of prudent reform, which came to the surface in his later writing. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); A. BICKEL, THE MORALITY OF CONSENT (1975); Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

148. Although I regard the study of prudent constraints on (and opportunities for) reform as—for the moment—subsidiary, I nonetheless view it as important and, in the long run, essential. Eventually, we need a conception of what openings for what sorts of reform our polity contains at what times. We need also a conception of how constitutional law and argument might take advantage of such openings and help create new ones.